No. 17037

United States
COURT OF APPEALS
for the Ninth Circuit

BUILDING SYNDICATE CO.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

FILED

MAR 15 1961

FRANK H. SCHMID, CLERK

THOMAS B. STOEL,
GEORGE H. FRASER,
DAVID G. HAYHURST,
HART, ROCKWOOD, DAVIES, BIGGS AND STRAYER,
1410 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-61

SUBJECT INDEX

	Page
Introduction	1
Argument	
I *Helvering* v. *F. & R. Lazarus & Company*, 308 U.S. 252, 60 S. Ct. 209 (1939), makes clear that the controlling rule in income tax cases involving the land trust device is a rule of property law. Applied to the instant case that rule requires a holding for appellant.	2
II Syndicate acquired only what it bargained for and what Union Trust Company intended to give it: a leasehold with option to purchase, not ownership subject to an indebtedness.	7
(a) Syndicate's financial resources permitted it to obtain only a leasehold.	7
(b) Discussion of *Oesterreich* and *Elliott* cases.	9
(c) Representations to the public that Syndicate had only a leasehold.	10
(d) That the trustee intended Syndicate to have a leasehold interest is indisputable.	12
III Decision for the appellant will not result in a double tax benefit.	14
Conclusion	19

TABLE OF CASES

Page

City National Bank Building Company v. Helvering, 98 F.2d 216 (D.C. Cir. 1938) 3

Commissioner of Internal Revenue v. American Light & T. Co., 125 F.2d 365 (7th Cir. 1942) 18

Hawke v. Commissioner of Internal Revenue, 109 F.2d 946 (9th Cir.), cert. denied 311 U.S. 657, 61 S. Ct. 11 (1940) 17

Helvering v. F. & R. Lazarus & Company, 308 U.S. 252, 60 S. Ct. 209 (1939) 1, 2, 3, 4, 5, 6, 7, 12, 18

Helvering v. Salvage, 297 U.S. 106, 56 S. Ct. 375 (1936) 17

Helvering v. Schine Chain Theatres, 121 F.2d 948 2nd Cir. 1941) 18

Lazarus (F. & R.) & Company, 32 B.T.A. 633 (1935) 4

Maletis v. United States, 200 F.2d 97 (9th Cir. 1952), cert. denied 345 U.S. 924, 73 S. Ct. 782 (1953) 17

Oesterreich v. Commission of Internal Revenue, 226 F.2d 798 (9th Cir. 1955) 9, 10, 11

Robinson v. Elliott, 262 F.2d 383 (9th Cir. 1958) .. 9, 10, 11

Terre Haute, Indianapolis & Eastern Traction Co., 24 B.T.A. 197 (1931), rev'd on other grounds sub nom. Commissioner of Internal Revenue v. Terre Haute Electric Co., 67 F.2d 697 (7th Cir. 1933), cert. denied 292 U.S. 624, 54 S. Ct. 629 (1934) 13

The Akron Dry Goods Company, 18 T.C. 1143 (1952), aff'd per curiam 218 F.2d 290 (6th Cir. 1954) 2, 3, 4, 16

The Minneapolis Security Building Corporation, 38 B.T.A. 1220 (1938) 18

Van Antwerp v. United States, 92 F.2d 871 (9th Cir. 1937) 18

Wilhelm (A.) Co., 6 B.T.A. 1 (1927) 13

TABLE OF CASES (Cont.)

Page

Other Authorities

Federal Rules of Civil Procedure, Rule 8(c) 17

G.C.M. 11933, XII-2 Cum. Bull. 52 (1933) 13

Mertens, Law of Federal Income Taxation, Sec. 21.231 (rev. ed. 1958) 16

Osborne on Mortgages, Sec. 95 (1951) 3

No. 17037

United States

COURT OF APPEALS

for the Ninth Circuit

BUILDING SYNDICATE CO.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

INTRODUCTION

The appellee's brief is helpful in one respect: it points up sharply the principal differences between appellant and appellee in this case. Those differences can be grouped generally under three headings:

1. Appellee believes that the Supreme Court case of *Helvering* v. *F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939), requires a holding for appellee.

2. Appellee asserts that it was the intention of both Syndicate and Union Trust Company that the land trust arrangement should make Syndicate the owner rather than the lessee of the property.

3. Appellee argues that appellant will receive a double tax benefit if its position is upheld.

Each of these points will be discussed below.

I

Helvering v. F. & R. Lazarus & Company, 308 U.S. 252, 60 S. Ct. 209 (1939), makes clear that the controlling rule in income tax cases involving the land trust device is a rule of property law. Applied to the instant case that rule requires a holding for appellant.

We are in agreement with appellee in believing "that the instant case is controlled by the general principles announced in *Lazarus*." (Appellee's Br. 15). We differ in our view of the "general principles" there announced.

The Supreme Court in the *Lazarus* case held that the income tax effects of a land trust arrangement depend on a rule of property law—the "established doctrine that a court of equity will treat a deed absolute in form, as a mortgage when it is executed as security for a loan of money." 308 U.S. 255. Clearly the Supreme Court did not mean that in every land trust transaction the lessee must be treated in substance and for tax purposes as the owner of the property. If it had so intended the Tax Court in the later case of *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), aff'd per curiam 218 F.2d 290 (6th Cir. 1954),

could not have found that the taxpayer there acquired only a leasehold. However, the court in *Akron Dry Goods* correctly recognized that the *Lazarus* case turned on the "facts surrounding the transaction and particularly the testimony of the officers of the taxpayer and of the bank as to their intentions *at the time*. . . ." 18 T.C. 1143, 1147. The same factual distinctions make the holding in *City National Bank Building Company* v. *Helvering*, 98 F.2d 216 (D.C. Cir. 1938), consistent with that in *Lazarus*.

Further, an integral part of the property law concept which the Supreme Court applied is the rule that a deed, absolute in form, will be treated as a security device *only if both parties intended it as security*. See cases cited Appellant's Br. 17. In addition, where the question whether a deed was in fact given as security arises in three-party transactions like the one here involving the seller of the Northwestern Bank property, the trustee, and Syndicate, the courts apply a particularly stringent test stated in Osborne on Mortgages, Sec. 95, p. 226 (1951), as follows:

> "Plainly, in these tripartite cases he who would transform the expressed contract for sale into a different one which is supposed to be hidden by it carries a heavy burden. And the proponent of such a proposition cannot meet it by pointing to the elements which are common both to a contract of sale and to a mortgage."

What is said with respect to contracts of sale applies with even more force to leases with options to purchase.

Appellee compares selected formal details of the lease and declaration of trust in the *Lazarus* case with

the same details in the instruments in the present case and reaches the conclusion that because of the similarity of the documents, the instant case is controlled by *Lazarus* (Appellee's Br. 15, 16). But, of course, as the *Akron Dry Goods* case, supra, demonstrates, these formal details of the instruments cannot be controlling. It is the intent of both the parties—lessee and trustee—which is the touchstone, and it is in the evidence of this intent that *Lazarus* and the instant case are strikingly different, result in the acquisition of different property interests by the respective taxpayers, and so give rise to different results for income tax purposes.

The question of the intent of Syndicate and of Union Trust will be discussed at greater length in the following section of this brief. However, to illustrate the distinction between *Lazarus* and the present case, we note the following substantial factors which are extrinsic to the formal similarities of the documents in both cases and which conclusively differentiate the transaction in *Lazarus* from the one before the court. (These factors in the *Lazarus* case appear in the opinion of the Board of Tax Appeals, 32 B.T.A. 633 (1935).)

1. In *Lazarus* the taxpayer originally constructed and owned the buildings and used them in its business; Syndicate had no prior interest in the property.

2. In *Lazarus* the transaction was a refinancing of an existing mortgage and current debt of the taxpayer; this is not true here.

3. The taxpayer in *Lazarus* was looking for a loan

which was offered to it by the trustee; Syndicate neither applied for nor was offered a loan.

4. In *Lazarus* the property was conveyed to the trustee by the taxpayer; here the property was sold to the trustee by a third party.

5. It was the undisputed testimony in *Lazarus* that the taxpayer desired to obtain a long-term loan on the security of its real property; in the present case the undisputed testimony is directly to the contrary.

6. In *Lazarus* the representative of the trust company testified that he did not consider that it was buying the property but that it was making a loan. In this case the testimony of the representative of Union Trust Company was directly to the contrary.

7. In *Lazarus* the taxpayer was not given the right to mortgage its interest; here Syndicate had the right to mortgage its leasehold and did so to secure a bond issue sold to the public.

The enumerated circumstances in the *Lazarus* case are all extrinsic to the formal documents and, as the Supreme Court said, called for application of the property law "doctrine—here controlling—of looking to extrinsic evidence behind a transfer aboslute on its face to determine whether only a security transaction was contemplated by the parties." 308 U.S. 252, 255. The circumstances in *Lazarus* were of a nature which supported classification of the transaction as a mortgage under well-established principles of law. The direct testimony of both parties that they considered the transaction

to be a mortgage would by itself ordinarily be conclusive of the question. As we have seen, none of these circumstances were present in the instant case.

By conveniently overlooking the other six factual differences listed above, appellee erroneously states that the only difference between the instant case and *Lazarus* is the factor listed as Item 3, namely, that in *Lazarus* the property was conveyed to the trustee by the taxpayer and here the property was sold to the trustee by a third party (Appellee's Br. 16). But appellee has also erred in failing to recognize the significance of this particular difference in the facts.

In *Lazarus* the taxpayer already owned the property and had a tax basis for it. The question was whether under the land trust arrangement the taxpayer had recovered that basis through a sale to the trustee so that he had nothing left to depreciate, or whether he had simply borrowed money on the property leaving his depreciation basis unaffected. Here, since Syndicate had no prior interest in the property a different question is presented, i.e., did Syndicate purchase an interest in depreciable property, or did it purchase a leasehold.

Stated another way, it was relatively easy for the court in *Lazarus* to decide that the pre-existing interest of the taxpayer in depreciable property was not changed by the land trust arrangement. However, to hold that Syndicate acquired a depreciable interest in the Northwestern Bank property it would be necessary to find that the land trust transaction created in Syndicate an interest which it had never owned before and one which the parties never intended it to have.

Finally we come back to the point made in appellant's opening brief, pp. 12, 13, that the District Court's misinterpretation of the *Lazarus* case led it into an error of law in its view that under some doctrine of ownership for "tax purposes"—independent of property law rules—Syndicate should be treated as the owner "for income tax purposes." As described above, the *Lazarus* decision is based on the property law rule that extrinsic evidence may be relied upon to prove a deed absolute to have been a security device. The evidence in *Lazarus,* such as that detailed above, showed the transaction to have been intended as a secured loan. Very different evidence in the Northwestern Bank transaction shows Syndicate to have been purely a lessee.

II

Syndicate acquired only what it bargained for and what Union Trust Company intended to give it: a leasehold with option to purchase, not ownership subject to an indebtedness.

(a) *Syndicate's financial resources permitted it to obtain only a leasehold.*

Appellee's argument under Parts C and D (Appellee's Br. 21-32) is an attempt to remake the Northwestern Bank transaction into something which the parties never intended it to be—indeed, into the kind of transaction which Syndicate found it could not accomplish in 1927.

Appellant is not insisting "that the court must take the taxpayer's name for its relationship to the property

at face, and determine the consequences on that basis." (Appellee's Br. 22). Appellant does insist that the limited rights of a lessee, which were all that Syndicate's slender financial resources enabled it to acquire in the property in 1927, cannot now be transmuted into the rights of an owner with all the differing income tax consequences which attach to ownership. Far from exalting form over substance as appellee complains, appellant insists that the true substance of what it acquired—a leasehold—be given recognition.

Let us go back again to the situation confronting Syndicate's promoters in 1927. They realized that with their limited capital of $300,000 they could not acquire ownership of the Northwestern Bank property by borrowing the balance of the purchase price (R. 74, 107). They could, however, get a foothold on the property by having a trustee for land trust certificate holders acquire it and grant them a 99-year leasehold which they could mortgage to raise additional funds. By including in the lease an option to purchase they had the possibility of enlarging their leasehold to a fee interest if the building's earnings were sufficient. As a price for being able to take only the limited interest of a lease in the property, Syndicate subjected itself to the hazards of cancellation of the lease and immediate dispossession with no right of redemption.

Appellee says that "the whole transaction was set in motion by Syndicate . . . and that its intention was to buy the property." (Appellee's Br. 25). There is no doubt that Syndicate's promoters were the energiz-

ing force in the transaction, but the record is clear that they knew that they could not finance the purchase of the property (R. 74). They had to content themselves with "second best," the acquisition of a leasehold and the possibility that Syndicate could accumulate earnings enough to exercise the option to purchase. References in its minutes to "purchase" of the property were, in fact, the over-exuberant language of the promoters. The confused, inconsistent, and changing classification of its interest in the property in its book entries and audit reports is attributable to its accountant's lack of familiarity with land trust arrangements which were new to Oregon (R. 113).

(b) *Discussion of Oesterreich and Elliott cases.*

Appellee contends strongly that the cases of *Oesterreich* v. *Commissioner of Internal Revenue,* 226 F.2d 798 (9th Cir. 1955), and *Robinson* v. *Elliott,* 262 F.2d 383 (9th Cir. 1958), require a holding that Syndicate was the owner rather than the lessee of the property. In the *Oesterreich* case, on the authority of which the *Elliott* case was decided, this court phrased the test as to whether a document called a lease was to be treated as a contract of sale as follows (226 F.2d 802):

> "We must look, therefore, to the intent of the parties in terms of what they intended to happen."

Applying this test, it is appellant's position that Syndicate obtained, and Union Trust Company intended to give it, only the interest that Syndicate's limited capital would buy—a leasehold plus an option which gave Syndicate a hope of some day acquiring the fee.

This court was careful to distinguish the *Oesterreich* case from those in which "the option price constituted full consideration for the premises or goods acquired" and in which "it was always questionable whether or not the options would be exercised." 226 F.2d 798 at 802, 803. The purchaser, Wilshire, in *Oesterreich* "would not have agreed to the 'lease' unless it provided that title would vest in Wilshire," id. at 803. In the present case Syndicate realized its finances permitted it to acquire only a leasehold in the property, and both it and the trustee realized it was always questionable whether or not the option would be exercised (R. 106, 119).

As for the *Elliott* case the facts there were far different from those in the case at bar and pointed irresistably to the conclusion that the transaction was intended to be a sale, not a lease. The lease term there was ten years; here it was 99 years. The annual net return on the option price in *Elliott* was stated by this court to be 25.33 per cent. Here the annual rent amounted to a normal return of approximately 5 per cent of the option price. In *Elliott* the purported lessee, in the exercise of sane business judgment, could not have entered into the arrangement except on the theory it was buying the property. In the present case the arrangement provided every prospect of a normal profit for both Syndicate and its lessor whether or not Syndicate exercised the purchase option.

(c) *Representations to the public that Syndicate had only a leasehold.*

Particularly noteworthy is the fact, omitted by appellee in its brief, that where the rights of third parties

were involved, Syndicate and Union Trust Company were careful to state precisely the rights which Syndicate acquired in the Northwestern Bank transaction. To finance its acquisition of a leasehold, Syndicate had to sell to the public $750,000 of first mortgage leasehold bonds (R. 15, 64). That mortgage (Ex. 8) accurately describes Syndicate's interest as a leasehold, and if the trustee and Syndicate had secretly intended to create a different type of interest in Syndicate, their misrepresentation to the public which bought the leasehold bonds would have subjected them to severe liability for fraud on the bondholders.

The rights of the public were also involved in the representations made in the marketing of the land trust certificates and here again Syndicate and Union Trust Company were careful to disclose the nature of the transaction. In the record of this case are a booklet entitled "The Land Trust Certificate Analyzed for Investors" (Ex. 17), distributed by George W. York & Co., one of the underwriters of the Northwestern Building Site Land Trust Certificates, and a prospectus relating to the certificates issued by Union Trust Company (Ex. 3). Each of these documents represents that the certificates are shares of equitable ownership in fee simple title to the property, with the lessee corporation owning a 99-year leasehold.

The existence of these representations to the public —land trust certificate holders and purchasers of leasehold bonds—obviously made the present case very different from the *Oesterreich* and *Elliott* cases, supra. In those cases it was not difficult to find that the private

intentions of the parties—no third-party rights being involved—were not correctly expressed by the formal nomenclature used in the documents.

(d) *That the trustee intended Syndicate to have a leasehold interest is indisputable.*

Appellant has contended throughout this brief and its opening brief that under the *Lazarus* rule a land trust transaction will be held to be a security device with the trustee in the position of a creditor only where the evidence shows that *both* parties intended this result. Appellee has been unable to offer more than feeble and easily refutable arguments that such an intention existed on the part of Union Trust Company (Appellee's Br. 31, 32). For example, appellee complains that the taxpayer failed to submit documentary evidence of how the trustee treated the transaction on its books. However, the record shows that Union Trust Company failed in the depression year of 1933 and thereafter its affairs were closed out by a conservator or liquidator (R. 134). In these circumstances the taxpayer's inability to submit Union's books is easily understood. Indeed, in view of the 32 years which elapsed between the Northwestern Bank transaction in 1927 and the trial in 1959, it is fortunate that Mr. A. C. Coney, Vice President and representative of Union in the negotiations, was alive and available to testify. His testimony, as a disinterested witness, was unequivocally to the effect that Union did not intend to hold title as a security interest with Syndicate as the equitable owner, but that a true lessor-lessee relationship was intended and put into effect (R. 118, 119).

Appellee has commented on the fact that in 1933 when Syndicate became unable to pay its rent, the property was not in fact forfeited. But it has ignored the testimony that Union Trust Company at that time—as throughout the entire transaction—took action consistent with its position as owner-lessor and proceeded to take steps to cancel the lease. Only by the most strenuous efforts and persuasion was Syndicate able to obtain concessions in the rent payments to permit it to continue in occupancy of the property (R. 106, 107). The plea by Syndicate to the holders of the land trust certificates for relief from the lease burdens was set forth in a letter from Syndicate to the certificate holders dated July 17, 1933 (Ex. 15).

Appellee says that it is indicative of trustee's intention to regard Syndicate as the purchaser of the property that neither it nor the land trust certificate holders claimed a deduction for depreciation on the building (Appellee's Br. 31). But we know of no case, nor has appellee cited any, which would permit the lessor-trustee or its certificate holders to claim depreciation on the building where Syndicate as lessee had the duty to maintain, restore, and replace the building during a lease term extending far beyond the life of the building. Authorities to the contrary are *A. Wilhelm Co.*, 6 B.T.A. 1 (1927); *Terre Haute, Indianapolis & Eastern Traction Co.*, 24 B.T.A. 197, 210-213 (1931), rev'd on other grounds sub nom. *Commissioner of Internal Revenue* v. *Terre Haute Electric Co.*, 67 F.2d 697 (7th Cir. 1933), cert. denied 292 U.S. 624, 54 S. Ct. 629 (1934); G.C.M. 11933, XII-2 Cum. Bull. 52 (1933). So far as the trustee

was concerned, the improvements on the property were not being exhausted. It is apparent that this portion of appellee's argument, based as it is on an erroneous premise, is meaningless.

Lastly, appellee seeks to minimize the effect of the trustee's request in 1938 that the balance sheet presentation of Syndicate's interest in the property in its independent auditor's report be corrected to eliminate the possibility that it might be interpreted as showing that Syndicate had an ownership interest in the property (Appellee's Br. 32). Yet this is the most unmistakable evidence of the trustee's continuing intention and understanding that Syndicate was a lessee—not an owner (Ex. 52-N, pp. 5, 6). Moreover, Syndicate immediately made the requested correction and thereafter its audit reports clearly designated its interest as a leasehold estate (Exs. 16, 52-N, O, P).

The fact is that appellee has been unable to point to any deviation by the trustee from its consistent position—in the form of the documents, in the testimony of its officer, in its representations to the public, and in its actions—that the transaction gave Syndicate only the rights of a lessee in the property.

III

Decision for the appellant will not result in a double tax benefit.

It is of course stipulated that appellant's predecessor claimed deductions on the American Bank Building on the basis of the remaining life of the building rather

than amortizing the cost of the 99-year leasehold which it held (R. 9). However, appellee's insistence that a decision for the appellant will result in a double tax benefit is wholly unwarranted. Appellant contends that it acquired the property in two bites; a leasehold in 1927 and the lessor's reversion in 1945 upon exercise of the option to purchase. It is undisputed that in this view of the transaction appellant is entitled to include in its basis the unamortized balance of the cost of its leasehold ($444,195.80 as of December 31, 1944, R. 9) plus the purchase price paid in 1945 ($1,417,500, R. 8). Nor is there any dispute as to the allocation of $1,000,-779.96 of the total basis as the basis of the building (R. 9). This amount, adjusted for depreciation to October 31, 1945, is the agreed basis of the building ($986,-430.78, R. 10) if appellant is correct in its contention that it acquired the property in two bites.

The real issue in the case, then, is whether appellant did acquire the property in two bites. If it did, there cannot possibly be a double tax benefit because every dollar of depreciation deducted by appellant's predecessor has been applied to reduce the unamortized portion of its leasehold cost and, therefore, to reduce appellant's present basis for the property. The aggregate amount of all deductions claimed from 1927 through October 31, 1945 ($549,215.08, R. 10) has been eliminated in arriving at the agreed basis of $986,430.78, although $274,784.49 of these deductions did not result in *any* tax benefit to appellant or its predecessor, and never will (R. 10). (We use the term "tax benefit" in the generally accepted sense that no benefit arises from

a particular deduction where other allowable deductions exceed gross income. See 3A Mertens, Law of Federal Income Taxation, Sec. 21.231 (rev. ed. 1958).) The amount originally paid by appellant's predecessor for its leasehold was $952,133.07 (R. 6). The amount stipulated as the unamortized balance of leasehold estate as of December 31, 1944 ($444,195.80, R. 9) represents only the original cost of the leasehold less all depreciation deductions to that date ($549,215.08 minus $26,-061.92, or $523,153.16, R. 10) adjusted for minor amounts capitalized as additions and leasehold improvements during the period.

Since the aggregate amount of all deductions claimed by appellant and its predecessor has already been charged against appellant's basis for the building in arriving at the stipulated amount of that basis ($986,-430.78, R. 10), it is apparent that a decision for appellant cannot result in a double tax benefit. No part of the previously deducted depreciation will ever be deducted again and, in fact, $274,784.49 of that amount never has resulted, and never will result, in *any* tax benefit. The resolution of the real issue, whether or not appellant acquired the property in two bites, is only beclouded by spurious arguments about tax benefit.

In light of this analysis, *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), aff'd *per curiam* 218 F.2d 290 (6th Cir. 1954), would be analogous only if the taxpayer there had charged against its claimed 1945 basis for depreciation the whole amount of basis used to establish the 1929 loss on the sale of the property. Of course this was not done. But if it had been done, there

would have been no double tax benefit in that case, just as there is none here.

Appellee cites two cases involving what it calls attempted repudiation of family partnerships (Appellee's Br. 18, 19). However authoritative those cases may be on their own facts, they are not applicable here. They are based on the rule that one who has available to him several lawful alternative forms for doing business, and elects one of them, cannot thereafter revoke his election and claim that the form chosen was a sham or unreal. See *Maletis* v. *United States,* 200 F.2d 97, 98 (9th Cir. 1952), cert. denied 345 U.S. 924, 73 S. Ct. 782 (1953). In each of those cases, the validity of the partnership under state law was admitted. Here, no one, least of all appellant, contends that the lease, the leasehold bonds which were sold to the public, the declaration of trust and the land trust certificates which were sold to the public, were sham or unreal.

We rather think that the real thrust of appellee's contention in this regard is that appellant is estopped to deny the right of its predecessor to claim depreciation on the building. Appellee's reluctance expressly to characterize the defense is understandable since it was not pleaded and therefore is not an issue in the case. Fed. R. Civ. P. 8(c); *Helvering* v. *Salvage,* 297 U.S. 106, 56 S. Ct. 375 (1936). But even if estoppel were before the court, there is a more basic reason why it is inapplicable here. An estoppel may not be predicated upon a mistake of law, particularly where both parties participate. *Helvering* v. *Salvage,* supra; *Hawke* v. *Commissioner of Internal Revenue,* 109 F.2d 946 (9th

Cir.), cert. denied 311 U.S. 657, 61 S. Ct. 11 (1940); *Commissioner of Internal Revenue* v. *American Light & T. Co.*, 125 F.2d 365 (7th Cir. 1942); *Helvering* v. *Schine Chain Theatres*, 121 F.2d 948 (2nd Cir. 1941). Here, both appellee and appellant's predecessor participated in the mistaken legal conclusion that the latter was entitled to depreciation on the building. Furthermore, representatives of appellee made numerous independent investigations, audits and reports, some of which expressed doubt and inconsistency as to the proper tax treatment of the transaction (revenue agents' reports attached to Ex. 50-A; 50-E; 50-K; 50-R). See *Helvering* v. *Schine Chain Theatres*, 121 F.2d at 949, 950. The confusion in the minds of these parties as to the proper tax treatment of this novel transaction is not surprising, in view of the fact that the applicable general rules were not finally settled until the *Lazarus* decision in 1939. As late as 1938, the question whether a lessee under a land trust transaction could recover his investment over the life of the building rather than the term of the lease was still unsettled, quite apart from any thought of treating the transaction as a mortgage. *The Minneapolis Security Building Corporation*, 38 B.T.A. 1220 (1938).

Of course, appellee would have the burden of proving every essential element of the doctrine of estoppel, which it has wholly failed to do. See *Van Antwerp* v. *United States*, 92 F.2d 871, 875, 876 (9th Cir. 1937). In these circumstances, appellant is not estopped or precluded from asserting that its predecessor held only a leasehold interest in the property.

CONCLUSION

For the reasons stated the judgment of the District Court should be reversed.

Respectfully submitted,

THOMAS B. STOEL,
GEORGE H. FRASER,
DAVID G. HAYHURST,
HART, ROCKWOOD, DAVIES, BIGGS
AND STRAYER,
Attorneys for Appellant,
1410 Yeon Building,
Portland 4, Oregon.